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IN THE SUPREME COURT OF THE UNITED STATES

No. 74-1356

JESSIE LEWIS NICHOLAS
and GRACE NICHOLAS (NMI),

Bankrupts,

EDITH RALEY,

Petitioner,

v.

JESSIE LEWIS NICHOLAS
and GRACE NICHOLAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

EDITH RALEY, petitioner, respectfully requests that a writ of certiorari issue to review the opinion dated January 29, 1975, of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of New Mexico (Cause No. 74-1490).

(a) OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit will be officially reported in the Federal Reporter; however, the citation is not yet available, and the opinion is annexed as appendix A, pp. 7-16.

(b) JURISDICTION

(i) The opinion of the United States Court of Appeals for the Tenth Circuit was made and entered on January 29, 1975.

(ii) There was no rehearing.

(iii) The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1), certiorari to a court of appeals.

(c) QUESTIONS PRESENTED

This case arose as an adversary proceeding in the course of a bankruptcy, with Mrs. Raley filing a complaint seeking a judgment declaring her debt non-dischargeable. The bankruptcy court granted summary judgment to the bankrupts and the district court affirmed. The determination of non-dischargeability was limited to the record of the pre-bankruptcy default judgment in a state court.

The questions presented are:

1. Is the non-dischargeability of a debt an issue for the bankruptcy court to determine after an inquiry into all facts relevant to the debt, not limiting itself to the court record of a prior default judgment?

2. Is there an issue of fact as to non-dischargeability that defeats summary judgment?

(d) STATUTES INVOLVED

The statutes involved are 11 U.S.C. §§ 11(a)(12), and 35(a)(2), (4), and (8) set forth in appendix B, pp. 17-18.

(e) STATEMENT OF THE CASE

Mrs. Raley sold some milk cows to the bankrupts on September 1, 1970, retaining a security interest in the cows and the milk produced. She sued in the New Mexico District Court for damages because of non-performance. The bankrupts failed to pay some $16,000 and failed to keep the agreed number of cows at all times. A money judgment was entered on June 21, 1973, following the bankrupts default.

The bankrupts filed their petition in bankruptcy on January 8, 1974, noticing Mrs. Raley's debt as an unsecured claim.

Mrs. Raley's complaint in the bankruptcy court was timely filed. She alleged that a portion of her debt was non-dischargeable under 11 U.S.C. § 35a, because of the bankrupts' willful and malicious acts in converting cows in which Mrs. Raley had a security interest. The bankrupts moved for summary judgment based solely on the default judgment

transcript in the state court. An affidavit in opposition indicated that 18 cows were missing from the herd; that Mr. Nicholas, one of the bankrupts, had refused to count the cows and verify those missing; and that Mr. Nicholas admitted selling perhaps over forty of the cows.

(f) NO STATE COURT JUDGMENT

No review of a state court judgment is sought.

(g) JURISDICTION IN THE BANKRUPTCY COURT

The summary judgment was granted by the Bankruptcy Court, United States District Court for the District of New Mexico, pursuant to jurisdiction conferred by 11 U.S.C. § 35 and Bankruptcy Rule 756.

(h) ARGUMENT

The writ should be granted because (1) the Tenth Circuit's decision is in conflict with decisions of the other courts of appeal; (2) the question of bankruptcy law involved is an important question of federal law which has not been, but should be, settled by the Supreme Court; (3) the Tenth Circuit has decided the federal question in conflict with some pronouncements of the Supreme Court.

The 1970 amendments to the Bankruptcy Act and the new Bankruptcy Rules place exclusive jurisdiction in the bankruptcy court to determine the non-dischargeability of debts. 11 U.S.C. §§ 11, 32, 35, amended 1970; see Chernick v U.S., 492 Fed. 2d 1349 n.4 at 1351 (7th Cir. 1974);

see also 1A Collier, Bankruptcy 1580.1.

The manner in which that exclusive jurisdiction is exercised is a federal question of substance and significance in the administration of bankruptcies. We are concerned here with the scope of inquiry when the creditor has obtained a pre-bankruptcy default judgment.

With the decision in this case, the scope of inquiry to determine non-dischargeability is limited to the court record of a pre-bankruptcy default judgment; no extrinsic evidence is allowed. The Tenth Circuit is thus at odds with the Second, Third, Eighth, and Ninth Circuits, the District of Columbia Circuit, and probably the Seventh Circuit. See Greenfield v. Tuccillo, 129 F.2d 854 (2d Cir. 1942); Matter of Johnson, 323 F.2d 574 (3d Cir. 1963); Fierman v. Lazarus, 493 F.2d 1400 (3d Cir.); Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961); Martin v. Rosenbaum, 329 F.2d 817 (9th Cir. 1964); Whelan v. U.S. Guarantee Corp., 252 F.2d 851 (D.C.Cir. 1958); Chernick v. U.S., supra.

In these other courts of appeal, the non-dischargeability of a debt would be determined on the basis of any evidence that bears on the nature of the debt. As the editor of Collier on Bankruptcy observes, the issue of non-dischargeability is exclusively for the bankruptcy court; it was not an issue resolved by the pre-bankruptcy default judgment; and it relates to the character of the debt from the standpoint of non-dischargeability, not liability. 1A Collier, Bankruptcy, ¶ 17.16 at 1650.1 and ¶ 17.17 at 1666-67 (14th ed. 1972).

The importance of our case is underscored by the expanded jurisdiction of our bankruptcy courts, the increase in

bankruptcies with our shaky economy, and the frequency with which questions of non-dischargeability are likely to arise. Different results in different circuits contadict the uniformity of federal bankruptcy. It is most appropriate for the Supreme Court to resolve the conflict and state a uniform rule of inquiry.

There are also some pronouncements of the Supreme Court that are instructive. Wetmore v. Markoe, 196 U.S. 68 (1904), stated that a judgment should not prevent a bankruptcy court from inquiring into the process and determining the nature of the liability reduced to a judgment. Pepper v. Litton, 308 U.S. 295 (1939), affirms the broad equitable powers of a bankruptcy court to search behind a judgment and ascertain, for example, a fraudulent scheme. These powers are sufficiently broad, we maintain, to inquire fully as to the character of a debt to ascertain non-dischargeability.

Summary judgment is unavailable to bankrupts on this record. There are genuine questions of fact. Rule 56, Rules of Civil Procedure. The bankrupts' sale of cows subject to a security interest raises a fact issue as to malicious conversion which would render the debt non-dischargeable. 11 U.S.C. § 35. See McIntyre v. Kavanaugh, 242 U.S. 138 (1916).

CONCLUSION

It is respectfully requested that a writ of certiorari issue to the Court of Appeals of the Tenth Circuit.

James A. Landon
Anthony F. Avallone

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1490

JESSIE LEWIS NICHOLAS
and GRACE NICHOLAS (NMI),

Bankrupts,

EDITH RALEY,

Plaintiff-Appellant,

v.

JESSIE LEWIS NICHOLAS
and GRACE NICHOLAS,

Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico (Bankruptcy Nos. B-74-19 and B-74-20).

Submitted on the Briefs.

Anthony F. Avallone, for Plaintiff-Appellant.
F. L. Nohl, for Defendants-Appellees.

Before LEWIS, Chief Judge, and SETH and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a bankruptcy matter in which the trial court granted summary judgment in favor of the bankrupts. The creditor had filed a complaint in the bankruptcy proceedings seeking a determination that her claim was nondischargeable under the provisions of 11 U.S.C. § 35(a)(2), (4), and (8). The claim had previously been reduced to judgment in the state courts of New Mexico.

In opposition to the complaint the bankrupts filed a motion for summary judgment, alleging that there was no genuine issue of material fact. Attached to the motion was a certified copy of the proceedings in the state court of New Mexico, including a copy of the complaint and the default judgment entered when the defendants in that action, the bankrupts here, failed to appear. In opposition to the motion for summary judgment the claimant filed an affidavit made by her son, about which more will be said later.

Based on the record as thus made the trial court granted the motion for summary judgment and held that the claim in question was dischargeable under applicable bankruptcy law. The claimant now appeals. Under the circumstances we conclude that the trial court acted properly. Additional detail is necessary in order to give meaning to our conclusion.

Edith Raley, the claimant, sold certain cattle and dairy equipment to Jessie L. Nicholas and Grace Nicholas, hereinafter referred to as Nicholas, under a conditional sales contract. Nicholas later failed to perform as called for by the contract and Raley then instituted an action for breach of contract in the district court for Dona Ana County, in New Mexico. Attached to the complaint filed in the state court was a copy of the con-

ditional sales contract. The complaint stated that Nicholas had breached the contract in two particulars. No mention was made in the complaint of any fraud or deceit or malicious conversion on the part of Nicholas.

As indicated, Nicholas did not respond to service of process, and a default judgment was entered against him. No mention was made in the judgment of any fraud or malicious conversion on the part of Nicholas, the court simply noting that "the plaintiff should be accorded the relief requested in the complaint."

Thereafter Nicholas filed a voluntary petition in bankruptcy, and listed the Raley judgment as one of his outstanding debts. It was in this setting that Raley filed her complaint in the bankruptcy proceedings seeking to have her claim based on the New Mexico judgment declared to be a nondischargeable claim. As grounds therefor, Raley alleged that the liability was the result of false pretenses, fraud, and embezzlement on the part of Nicholas, and, alternatively, that the debt represented a liability for willful and malicious injury to property. See 11 U.S.C. § 35(a)(2)(4) and (8). Nicholas responded to this complaint with the motion for summary judgment referred to above. Raley then filed an affidavit of her son wherein the latter declared, among other things, that Nicholas had advised him, the affiant, that "he [Nicholas] did not want to cheat anybody, but he admitted breaking every rule in the contract he signed with my mother." This in our view is the only part of the affidavit that has any possible bearing on our problem.

The referee in bankruptcy granted the motion for summary judgment and dis-

missed the complaint and the action set forth therein. On appeal the trial court affirmed the action taken by the referee and held that the claim was dischargeable in bankruptcy. Raley now appeals. We affirm.

In granting summary judgment the trial court held that on the record as theretofore made in the New Mexico state court, which included the complaint, the conditional sales contract attached to the complaint and the default judgment entered on the complaint, there was a clear showing that the liability of Nicholas was founded on breach of contract and not fraud, deceit or malicious conversion, and that accordingly there was no need to resort to extrinsic evidence in any effort to ascertain the true nature of the underlying liability. The trial court indicated that if there were ambiguity or doubt in connection with the state court proceeding, then resort could be made to so-called extrinsic matters. In thus holding, the trial court declined to take into consideration the affidavit of Raley's son. We find no error in thus declining to consider this affidavit, which actually did not in anywise contradict the complaint or the judgment as entered in the New Mexico court. In fact, the affidavit supports the proposition that Nicholas' liability was based on breach of contract, not fraud. As above noted, Raley's son declared that Nicholas had told him that he (Nicholas) didn't intend to "cheat" anyone, though he had broken "every rule in the contract."

A discharge in bankruptcy releases a bankrupt from all of his provable debts with certain exceptions. For example, a discharge in bankruptcy does not release a bankrupt from liabilities incurred by

obtaining money or property by means of false pretenses or false representations. 11 U.S.C. § 35(a)(2). Whether a given liability is one for simple debt or fraud thus determines whether it is dischargeable in bankruptcy and it is a matter which has previously caused conflict between the federal and state courts. However, in 1970 Congress empowered the bankruptcy court to determine the dischargeability of debts, and, after such amendment, an application must now be timely filed by the creditor in the bankruptcy court if he would have his claim be determined to be nondischargeable. 11 U.S.C. §§ 11, 32 and 35, as amended. See Collier on Bankruptcy, Vol. 1A, ¶ 17.01, pp. 1580-1580.1, and ¶ 17.16 [6], p. 1649.

Contrary to the assertion of counsel for Raley, we do not regard the amendments of 1970 to have in anywise changed the substantive law on the precise problem here at hand, which is: May a creditor whose claim for breach of contract has previously been reduced to judgment in a state court go "behind" the record as made in the state proceeding and attempt to show by extrinsic evidence that the liability was in reality one based on fraud? The trial court held that where, as here, the entire record, not just the judgment, of the state proceeding established clearly that the liability was one for damages caused by breach of contract, and not fraud, there would be no resort to extrinsic evidence. We agree, although we are aware that the authorities on this point are not in accord. For two cases from state courts which summarize quite well the competing views on this subject, see Kuzemchak v. Pitchford, 468 P.2d 409 (N.Mex. 1970), cert. denied, 400 U.S. 833 (1970), and Miller v. Rush, 393

P.2d 565 (Colo. 1964). In the latter case appears the following pertinent comment:

> "Only one question is presented here, and that is: May a court which has entered a *judgment go outside of* the record to determine whether the judgment is discharged by a general order of discharge in bankruptcy proceeding instituted by the judgment debtor, and in which proceeding the judgment creditor has filed a claim on its judgment alleged to be based upon the bankrupt's obtaining money by false pretenses and representations?
>
> "Many courts have considered this matter under varying circumstances and are at wide variance in their opinions.
>
> "Three conclusions have been reached:
>
> "1. The judgment is conclusive and the court may not go behind it to determine the facts on which predicated.
>
> "2. Review of the whole record of the case may be had to determine the real nature of the claim which was reduced to judgment.
>
> "3. Not only review of the whole record may be had, but the court may go outside thereof to determine the nature of the claim (this is a decided minority view).
>
> "Miller here urges that we should follow the minority rule. The trial judge refused to go outside of the record to determine the real basis of the judgment."

Concerning the effect of a judgment on the character of a liability, the following appears in Collier on Bankruptcy, Vol. 1A, ¶ 17.16 [4], pp. 1643-6:

"Since the amendment of 1903, which has been incorporated into the Act of 1938 the right of action need not be reduced to judgment; mere 'liabilities' for obtaining property by false pretense are excepted from the operation of a discharge. The question arises, however, whether the obtaining of a judgment prevents an inquiry into the original nature of the obligation. In general the reduction of a claim to a judgment does not affect its nature as a nondischargeable debt, dischargeability being dependent upon the nature of the claim behind the judgment. Where, however, a liability has been prosecuted to judgment, the record is usually held decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by the introduction of parol evidence except in the case of ambiguity. In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the record in the action must show that fraud and deceit were the 'gist and gravamen' of the action. A judgment obtained by default, where the claim is to recover for property obtained by false pretenses or false representations, will be excepted from the discharge, as in the case of a judgment obtained in a contested action." (Emphasis added).

In the instant case the trial court examined not just the judgment, but the entire record as made by Raley in her state proceeding against Nicholas, including the complaint and the conditional sales contract, as well as the judgment, and concluded that the liability was one

for breach of contract. We find no error in so holding. The complaint was based on a breach, in two specified particulars, of the conditional sales contract, and does not contain a whisper of fraud. Nor is there anything in the judgment itself to indicate that the judgment is based on anything but damages flowing from breach of contract. In such circumstances we conclude that the trial court was correct in declining to permit Raley to go behind the record as previously made in the New Mexico state court and attempt to show that the liability was in fact based on fraud and deceit, and therefore nondischargeable. Such action we believe is in accord with the general rule on the subject and also squares with the rationale of two earlier Tenth Circuit cases, Personal Industrial Loan Corporation v. Forgay, 240 F.2d 18 (10th Cir. 1956), and State Finance Company v. Morrow, 216 F.2d 676 (10th Cir. 1954). These two cases merit comment.

In Morrow, the bankrupt was discharged from all provable debts, one of which was a balance due a loan company on a note. After the discharge the loan company filed suit on the note in the state court. The bankrupt thereupon instituted ancillary proceedings in the bankruptcy court to enjoin the loan company from prosecuting the action in the state court after discharge in bankruptcy. The loan company argued that though its complaint in the state court was based on a promissory note, in reality its claim was based on a liability created by the false representations made by the bankrupt, and that the debt was therefore nondischargeable. The trial court enjoined the loan company from proceeding further with its action against the bank-

rupt in the state court. On appeal, this court affirmed and held that the trial court was justified in concluding that the suit brought by the loan company in the state court was one for debt, as it had alleged in its complaint filed in the state court, and not for fraud, as it had argued in the bankruptcy court. We deem Morrow to be analogous to the instant case.

Forgay involved a somewhat different set of facts. There, the bankrupt was discharged, and the claim of the loan company was one of the listed debts. The loan company did not appear in the bankruptcy proceeding, but filed an action in the state court alleging that the debt was nondischargeable because of a false financial statement made by the bankrupt. Default judgment was later rendered against the bankrupt in the state proceeding. When the loan company began to garnishee the bankrupt's wages, the latter instituted ancillary proceedings in the bankruptcy court to enjoin the loan company from pursuing execution. The trial court enjoined and on appeal this court affirmed. In affirming this court examined the complaint as filed in the state court and concluded that it was predicated on debt, and not fraud, notwithstanding the allegations regarding a false financial statement. In thus concluding, this court held that the fraud was not well pleaded, and that the complaint was essentially one for debt, and therefore was dischargeable in bankruptcy. It was on this basis that the trial court's action enjoining the loan company from pursuing its garnishment was upheld.

In sum, then, on the basis of the record before it, the trial court in the instant case did not err in granting the

bankrupt's motion for summary judgment. The record of the proceedings in the state court clearly indicated that the liability was one for damages arising out of breach of contract, and not fraud. Under such circumstances, there was no need to resort to extrinsic evidence.

Judgment affirmed.

APPENDIX B

STATUTES INVOLVED

11 U.S.C. § 11(a)(12) amended 1970:

§ 11. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to--

* * *

(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

* * *

11 U.S.C. § 35(a)(2), (4), and (8), amended 1970:

§ 35. Dischargeability of debts--Debts not affected by discharge

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as

* * *

(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance

upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another;

* * *

(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity;

* * *

or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

* * *

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

BRIEF
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent believes that the issues in this case do not revolve around a conflict between the opinion of the Tenth Circuit Court of Appeals and other Circuit Courts of Appeals; nor is the question involved one of bankruptcy; nor does the Opinion of the Court of Appeals, in this case, conflict with any of the pronouncements of the Supreme Court of the United States. The Court of Appeals followed the law of the forum.

The Supreme Court of New Mexico in the case of Kuzemchak v. Pitchford, 81 NM 438, 468 P.2d 409 (1970) Certiorari denied, 400 U.S. 833, 91 S. Ct. 66, established the law of this forum. The Court stated the question as follows:

> "May the judgment creditor go behind his judgment, and if so, how far, when the issue as to its dischargeability is raised?"

The Court concluded that the rule in New Mexico should be: "That a review of the whole record, including testimony, is permitted to determine the nature of the claim." The Court rejected the argument that the judgment is conclusive and also rejected the proposition that extrinsic evidence should be permitted to enlarge or explain the transcript of the proceedings. This determination of the Supreme Court of New Mexico thus became the law of the forum. The cases cited by Petitioner to sustain the proposition that there is a conflict between the various courts of appeals are not in point in that they are not based upon the law of the State of New Mexico but are presumably

based upon the laws of the State in which the Court was sitting. This Court, in the case of Erie Railroad Company v. Thompson, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) held that:

> ". . . the law to be applied in any case is the law of the State. And, whether the law of the State shall be declared by its Legislature in a statute or by its highest court by decision is not a matter of Federal concern. There is no Federal general common law."

This case was followed in Claxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487; 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), which also held that the law of the forum controls.

The Court of Appeals for the Eighth Circuit in Cervantes v. Time, Inc., 464 F.2d 986 (1972), at page 989, Note 5, has briefed the whole subject of the applicability of the law of the forum to the admission of evidence and concludes that the law of the forum prevails.

The Supreme Court of New Mexico in the Kuzemchak case, supra, has determined what evidence is admissible to determine the foundation of a judgment and has held that a court could only look at the record and could not hear extrinsic evidence.

An exemplified copy of the proceedings in the Dona Ana County District Court was submitted to the Referee in Bankruptcy. There was no fraud alleged in the complaint, and since there was a default judgment, no

testimony was taken. As pointed out by the Court of Appeals, the Affidavit filed by Mrs. Raley's son did not raise the question or an issue of fact; he merely stated that Respondents admitted breaching the contract. Breach of contract was the only cause submitted for recovery of the Judgment. Furthermore, assuming that Raley's affidavit had created an issue of fact, it was not admissible in evidence under the Kuzemchak case, supra, because it was not contained within the issues set forth in the complaint, nor was there any testimony showing that it was an issue at the time the judgment was entered. It is difficult to have a genuine issue of fact when under the law of the forum there is no admissible evidence which would give rise to an issue of fact.

The question presented here is exactly the same question which was disposed of adversely to the position of the Petitioner in the Kuzemchak case, supra. Petitioner is asking this court to reverse the Supreme Court of New Mexico in a matter of local law.

CONCLUSION

It is respectfully submitted that there are no grounds to issue a Writ of Certiorari in this case because there is no conflict between the opinions of the various courts of appeals of the United States; that the Referee in Bankruptcy, the U. S. District Judge and the Court of Appeals of the Tenth Circuit followed the law of the forum as pronounced by the Supreme Court of New Mexico, and there

is no genuine issue of fact presented which could be resolved by a second trial. In the Kuzemchak case, supra, the Supreme Court of New Mexico did not attempt in any way to interpret or adjudicate anyone's rights under the Bankruptcy law. All it did was pronounce a rule of evidence in the State of New Mexico.

F. L. Nohl
Attorney for Respondents